IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 631 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANANDRAO SHANKARRAO MARATHA (MORE)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 631 of 1998
MR JM PANCHAL for Petitioner No. 1
MR KC SHAH Ld.APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 18/07/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. This appeal under Section 374(2) of the Code of Criminal Procedure is directed against the judgement of conviction and sentence dated 28.5.1998, in Sessions Case No.129 of 1997, by the learned Additional City Sessions Judge, Ahmedabad, convicting the appellant - Anandrao Shankarrao Maratha (More) (original accused no.1) for the offence under Sections 17, 18, 20 (b) (ii) and 22 of the Narcotic Drugs and Psychotropic Substance Act (hereafter referred to as "the N.D.P.S.Act) imposing RI for a period of 10 years and fine of Rs.1 lacs and in default, RI for 1 year. By the said judgement, the original accused no.2 - Daud Baxji Chhipa (Muslim) came to be acquitted of the charges levelled against him.

2. That on 7.4.1997, P.I. Shri N.K.Chudasma, D.C.B Crime, Ahmedabad received information from Police Constable Jitendrasinh that Anandrao Shankarrao Maratha (More) is indulging in sale of Charas and Opium (Ganja) at his residence, situated near Verai Maata temple in Ghodasar area in the city of Ahmedabad; that Police Constable Jitendrasinh was asked to verify and confirm the information received, also telling that if the information is confirmed on verification then Constable Jitendrasinh should come with panchas to the office of P.I.; that police constable Shri Jitendrasinh, on verification and confirmation of the information, telephoned P.I. Shri N.K.Chudasma about the same; that the information about the information received was then reduced into writing in station diary; that in the meantime, the preparations for calling panch witnesses and preparing the preliminary panchnama were made; that thereafter preliminary panchnama was drawn in the police station; that the members of the staff in presence of the panchas were informed about the information received; that thereafter the panch witnesses were asked to take the personal search of the members of the raiding party; that thereafter, the panch witnesses and members of the raiding party went to Ghodasar and reached near the house of Anandrao Shankarrao Maratha; that they all collected at one tea stall, situated near the house of Anandrao Shankarrao Maratha; that there the police constable Jitendrasinh showed the house of Anandrao Shankarrao Maratha, who was at that time sitting out side his house; that P.I. N.K.Chudasma along with the panch witnesses and members of the raiding party went to the house of Anandrao Shankarrao Maratha and told him that they have information that he is having in his possession Charas as well as Opium (Ganja) without any licence or permission,

and that they want to search his house; that Anandrao Shankarrao Maratha was asked whether he would like to be searched in presence of Gazetted Officer or the Magistrate, to which Anandrao Shankarrao Maratha declined; that thereafter, Anandrao Shankarrao Maratha was personally searched in presence of panch witnesses and his house was also searched in presence of panch witnesses; that during the personal search and of the house, one bag containing opium weighing about 1823 grams was found and another bag containing charas weighing about 404 grams was also found during the search also with currency notes of Rs.10,000/- and Rs.35,736/- were recovered in presence of the panchas and Anandrao Shankarrao Maratha for which detailed panchnama was drawn in presence of the panchas; that from the seized opium and charas samples were taken which were separately packed and sealed putting slip containing the signatures of the panchas in the packing; that thereafter the accused was arrested.

That along with the report, Muddamal article was also handed over to the PSO in-charge of the police station and the complaint was filed against Anandrao Shankarrao Maratha for the commission of offence under Sections 17, 18, 20(b)(ii) and Section 22 of the N.D.P.S.Act, as Anandrao Shankarrao Maratha is found to actually and consciously possessing the contraband Charas and Opium without any authority or the licence and original accused no.2 - Daud Baxji Chhipa having supplied contraband Charas and Opium to Anandrao Shankarrao Maratha and thereby, indulging and assisting in the commission of the offence under the aforesaid provisions of the N.D.P.S.Act.

3. After the completion of the investigation, charge-sheet came to be submitted against both the accused persons; that the trial Court framed the charge against both the accused persons and the accused denied the charge levelled against them and claimed to be tried.

4. In order to bring the guilt home to the accused, the prosecution adduced oral as well as documentary evidence. The learned Trial Judge, on appreciation of evidence, convicted original accused no.1 - Anandrao Shankarrao Maratha (More) for the offence punishable under Sections 17, 18, 20 (b)(ii) and Section 22 of the N.D.P.S.Act and sentenced him to suffer RI for 10 years and pay fine of Rs.1 lacs and in default, to undergo RI for 1 years. The original accused no.2 - Daud Baxji Chhipa (Muslim) came to be acquitted of the charge levelled against him.

By the present appeal, the original accused no.1 - Anandrao Shankarrao Maratha (More) has assailed the conviction recorded against him and sentence imposed by the trial Court.

We have heard the submissions advanced by Mr.J.M.Panchal, learned advocate for the appellant -convict (original accused no.1) and Shri K.C.Shah, learned APP for the respondent - State.

5. As seen above, according to prosecution, the accused - Anandrao Shankarrao Maratha illegally and consciously possessed contraband Opium and Charas weighing 1823 grams and 404 grams respectively without any authorization or licence.

One of the arguments advanced by Mr.Panchal is that Subsection 2 of Section 42 of the N.D.P.S.Act is not complied with and committed breach of inasmuch as the telephonic information received around 11.30 a.m. by PW-3 P.I. N.K.Chudasma has not been reduced into writing, and that the information reduced into writing in station diary, Exh.26, is the one received at 2.15 p.m. after the preliminary panchanama was drawn at 2.00 p.m. vide Exh.10, is no compliance with the requirements of Subsection 2 of Section 42 of the N.D.P.S.Act.

Referring to Panchnama, Exh.10, it is submitted by Mr. Panchal that the preliminary panchnama was drawn at 14.00 hours and the same was concluded at 14:15 hours. Referring to Station Diary of 7.4.1997, Exh.26, it is further submitted that the information reduced into writing about the commission of offence under the N.D.P.S.Act is at 14:15 hours, and that Exh.26 also refers to the information given by PW-2 Jitendrasinh Ghanshyamsinh, Buckle No.5688; that this information has been received by PW-1 and told to PW-3 between 11.30 to 12.00 O'clock and the same should have been recorded soon after it was received rather than reducing the same into writing at 14:15 hours after the preparation of the preliminary panchnama, Exh.10; that complaint, Exh.30, also refers to the information received at 14.00 hours from PW-2, Buckle No.5688, D.C.B.

6. Section 42 of the N.D.P.S.Act requires recording of the reasons for belief and for taking down of information received in writing with regard to the commission of offence before conducting search and seizure.

The evidence of PW-2 - Police Constable Jitendrasinh Ghanshyamsinh, Exh.23, suggests that on 7.4.1997 while he was on duty in police station, the informant gave information that near Verai Maata's temple in Ghodasar area one Anandrao Shankarrao Maratha (More) is having Charas and Opium in his house and has been selling the same, whereupon the witness went to the place for verifying the information and having found the same to be true, he informed his superior officer P.I. N.K.Chudasma on telephone; that the witness was told that if the information received is true then, the witness should come along with the panchas to the police station; that thereafter, the witness came to Gaekwad Haveli Police Station where the D.C.B. police station is functioning, along with two panch witnesses informing them that narcotic raid is to be arranged.

In the cross-examination, it has been stated by the witness that he had gone to the police station around 10.00 to 10.30 O'clock in the morning; that the informant had not met him personally; that the witness was informed by the informant between 11.30 to 12.00 O'clock; that the witness did not note down the information that he had received from the informant. It is further stated that after the verification of the information, the witness was convinced about the truth of the information. It is also stated that the informant had informed the witness on telephone, whereupon the witness had gone to Ghodasar Verai Maata temple. Thus, it is suggested from the evidence of the witness that the telephonic information was received from the informant and he had informed the P.I. N.K.Chudasma about the information received and was asked to verify the same. The evidence also discloses that PW-2 had informed P.I. N.K.Chudasma about the telephonic information that he had received from the informant between 11.30 to 12.00 O'clock which information was asked to be got verified and confirmed by P.I. Shri N.K.Chudasma.

It is stated by PW-3 P.I. N.K.Chudasma that on 7.4.1997 while he was on duty, at about 14.00 hours, PW-2 informed the PW-3 that one person viz. Anandrao Shankarrao Maratha (More) resident of Ghodasar area has been keeping Charas and Opium illegally without any licence or authorization in the house on the land of Narandas Mangaldas Thakore, and Anandrao Shankarrao Maratha (More) has been selling these contraband.

In the cross-examination, it has been denied that at about 11.45 O'clock Police Constable Jitendrasinh had informed the witness on telephone; that it is denied that

before 14.00 hours PW-2 has met the witness in his chamber. It has been stated that PW-2 had personally met him at 14.00 hours. It is stated that the information given on telephone at 11.45 O'clock by Jitendrasinh was not reduced into writing and the same was also not sent to the superior officer; that the telephonic information received at 11.45 O'clock from PW-2 was not reduced into writing as the information was asked to be verified and confirmed and that is why, till then, the information received was not reduced into writing nor superior officer informed about the same.

7. The evidence of PW-2 and PW-3 suggests that PW-2 was informed on telephone by the informant about accused no.1 keeping / possessing contraband for sale without any authorization or licence. PW-2 thereafter informed PW-3 about receipt of such information on telephone, and PW-3 requiring PW-2 to verify and confirm the information received and if the information is found to be true to come with panchas. It is suggested that thereafter PW-2 verified the information and found the information to be correct, whereupon PW-3 told PW-2 to come to the police station with panchas and thereafter, PW-2 reaches the police station taking panch witnesses with him. It may be appreciated that timings deposed by PW-2 would be approximate and no two watches tally with eachother. Now, so long as the information initially received is not verified and confirmed, the same would not be attached any significance. The evidence also discloses that the PW-2 meets PW-3 personally at 14.00 hours. Before that PW-3 had asked PW-2 for the verification of the information and on the same found to be true, PW-2 comes to the police station with panch witnesses. It is true that Exh.10 suggests that the writing of the preliminary panchnama commenced at 14.00 hours. At the end of the preliminary part of the panchnama, the time mentioned is 14:15 hours. As pointed out earlier, Exh.26, station diary suggests the recording of Entry No.8 at 14:15 hours and the information given by police constable Jitendrasinh Ghanshyamsinh, Buckle No.5688, present in D.C.B. office, to P.I., D.C.B. (PW-3) is that in Ghodasar area, opposite Verai Maata temple, Anandrao Shankarrao Maratha (More), residing in the house on the land of Narandas Mangaldas Thakore, has been keeping the stock of Charas and Opium in the house of his possession and has been selling the said contraband. It is pertinent to note that Exh.26 also suggests that the same was written down while leaving for raid. The evidence on record discloses that the telephonic information received by PW-2 from the informant, was told to PW-3 on telephone between 11.30 to 12.00 O'clock and same was asked to be

verified and confirmed. Again telephone was sent by PW-2 informing about the verification of the information and the truth therein, wherein PW-3 asked PW-2 to come with panchas and thereafter, PW-2 comes to DCB office. It may be appreciated that PW-2 comes with panch witnesses to DCB office and on coming to the DCB office, writing of the preliminary panchanama must have commenced and almost simultaneously Exh.26 also came to be written and both completed at 14:15 hours. The evidence on record, in our opinion, does not disclose that the information which was verified and found to be correct by PW-2, was not reduced into writing on PW-2 informing PW-3 about the same in person. All what is required in law is that when the search and seizure is on the basis of the information received about the commission of the offence under the N.D.P.S.Act, the same be reduced into writing. PW-3 has stated in his evidence that the information Exh.26 was conveyed to his superior officer. The evidence of PW-3 also suggests that he informed his superior officer, PW-10, in writing about the receipt of information reduced into writing vide Exh.26 and that after the raid and recovery of muddamal and the arrest of the accused, he gave his complaint Exh.30 along with report Exh.55 to PW-3.

8. In the case of State of Punjab Vs. Balbir Singh, AIR 1994 SC 1872 in Para.26, it has been observed by the Apex Court that the question as regards the nature of the provisions of Section 41 (1) (2), 42(1) - search and seizure of N.D.P.S.Act arise frequently before the trial courts. Therefore, we find it necessary to set out our conclusions which are as follows:

(1) .....

(2A) .....

(2B) .....

(2C) Under Section 42(1) the empowered officer if has prior information given by any persons, that should necessarily be taken down in writing. But he has reason to believe from personal knowledge that office under Chapter-IV being committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without any warrant between sunrise and sunset and this provision does not mandate that

he should record his reason of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total noncompliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

In the instant case, Section 42(1) has no application inasmuch as there is no search, seizure or arrest between sunset and sunrise and, therefore, there is no question of recording reasons for search, seizure and arrest in the present case.

As far as the compliance with Section 42(2) of the N.D.P.S.Act is concerned, as observed above, it is disclosed by evidence of PW-2 and PW-3 that the information given in person by PW-2 after verification and the same having been found true, has been reduced into writing at 14:15 hours by PW-3 in station diary at Exh.26 while going for raid and almost simultaneously vide Exh.10 preliminary panchnama came to be concluded. It may also be appreciated that PW-2 coming to the D.C.B. office informing PW-3 about the verification of the information received and truth therein and getting the preliminary panchnama written would take some time. There is nothing unnatural or unusual in the commencement of the writing Exh.10 and the conclusion at 14:15 hours and Exh.26 suggesting time of 14:15 hours.

In the case of State of Punjab Vs. Baldev Singh, AIR 1999 SC 2378 in Para.10 the Apex Court observed that, "Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure"

Thus, it will be seen that what is required by Sub-section 2 of Section 42 is that the recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure (emphasis supplied).

In the instant case, the recording of the information received as regards the commission of offence is undisputedly before conducting search and seizure. Preparing the preliminary panchnama between 14.00 hours to 14:15 hours vide Exh.10 cannot be regarded as conducting search and seizure before reducing the information received in writing (emphasis supplied) vide Exh.26 at 14:15 hours, especially when Exh.26 in very clear words suggests that "while going in raid". Meaning thereby that before the raiding party left D.C.B.office for raid in question after Exh.26 was recorded. It need hardly be said that there cannot be search and seizure prior to panch witnesses and raiding party reaching the place of commission of offence. In our opinion, there is sufficient compliance with the mandatory requirements of Section 42 of the N.D.P.S.Act in the present case. Having regard to the evidence on record and the requirement for compliance with the provisions of Section 42(2) of the N.D.P.S.Act, we do not regard any illegality having been committed in this regard above.

9. As far as the incident of search and seizure in question is concerned, evidence of complainant, PW-3, P.I. N.K.Chudasma and PW-2 police constable Jitendrasinh suggests that both the witness along with panch witnesses and the staff members came to a house near Verai Maata temple in Ghodasar area; that PW-2 pointed out one house and at the entrance whereof one person was found sitting, who was identified as Anandrao Shankarrao Marhata (More) to the PW-3 and panch witnesses by PW-2, whereupon PW-3 gave details of the information to the panch witness and the members of the raiding staff and all of them on foot came to the house of Anandrao Shankarrao Maratha (More) and cordoned him; that Anandrao Shankarrao Maratha (More) was informed that they are the officers of Narcotic cell. Upon asking the name, that person gave his name as Anandrao Shankarrao Maratha (More); the accused no.1 is also identified by PW-2 and PW-3 in the Court; that the accused no.1 was told that he has been illegally keeping the stock of Opium and Charas in his house and he has been selling the same, and that search is to be carried out; that accused no.1 was informed in writing that his house is to be searched as there was an information that he has been keeping in his house Charas and Opium

illegally and selling the same for which Exh.27 was given to accused no.1. Thereafter, accused no.1 has been asked whether he wants himself to be searched in presence of gazetted officer or a magistrate and if he so desire, arrangement would be made for the same, and that the accused was informed about his right in this regard. The accused declined for being searched in presence of gazetted officer or the magistrate. That the accused was served with Exh.28 for his right and the accused having declined as pointed out above.

That thereafter keeping accused no.1 present and in presence of panchas, his house was searched and from one cylinder shape tin box, a cotton bag with sky blue colour lining was found and on opening the same two polyethylene small bags containing black brown substance was found which smelt like opium, whereupon the same was examined with Narcotic kit box and the same found to be opium. That accused no.1 was asked about licence, permit or authorization for keeping the same, to which he replied in the negative. That thereafter, the goldsmith Surajmal was called for weighing the seized contraband. The contraband recovered weighed 953 grams from which 24 grams was taken as sample for analysis by the Forensic Science Laboratory and another sample of same quantity was also taken as reserve sample. That the contraband found was packed and sealed with hot seal with the slips, Exh.11 and Exh.12 containing the signatures of the panchas inside the packing and also the muddamal packing. That reserve sample was taken putting the slip (Exh.13) containing the signatures of the panchas. From the other polyethylene bag found from the cotton bag greenish type black viz. opium substance was found which weighed 870 grams from which sample weighing 24 grams was taken. That the contraband and the sample were packed and sealed with hot seal in different packings with the slip, Exh.14 and Exh.15, containing signatures of the panchas inside the bag and on the packing, slip Exh.15 was put and pasted. Reserve sample was taken putting the slip (Exh.16) containing the signature of the panchas. That thereafter on further search in the house, from small polyethylene bag role type brown substance which smelt like Charas was found which was examined with Narcotic kit box which prima facie looked like Charas. The accused was asked whether he was having any licence or authorization to keep the contraband to which the accused replied in negative. The said substance was weighed through a goldsmith Surajmal which weighed 404 grams from which 24 grams was taken as sample for analysis. That the seized contraband and the sample both were packed separately and slip containing signatures of the panchas

(Exh.17 and Exh.18) was put inside and on the other side of the seized muddamal. The reserve sample was taken putting the slip (Exh.19) containing the signature of the panchas. On all the packings the seal of the police station was applied. The witness has also deposed that Exh.11 to Exh.19 also contained his signature also. It is also suggested that during the search, currency notes of Rs.10,000/- and Rs.35,736/- in the denomination of Rs.500/-, 100/- and 50/- were also recovered from the personal search and the house of accused no.1. It is also deposed that panchnama was drawn in presence of accused no.1 and the panch witnesses.

10. It is suggested from the evidence of PW-1 Madanlal Shivaji Bhatt that on 7.4.1997, at about 2.00 O'clock, he was standing near tea lorry, opposite Gaekwad Haveli Police Station; that at time, one person viz. Jitendrasinh took the witness inside the crime branch police station. There the witness was told that one Anandrao Shankarrao Maratha (More) is doing the business of opium and charas and his house is to be raided; that the witness gave his consent to act as panch and thereafter, preliminary panchnama, Exh.10, was prepared in the police station to that effect. It is further suggested by the witness that thereafter, along with the police staff persons the witness came to a place near Ghodasar police choki and therefrom, they came on foot to a house near Verai Maata temple. There, PW-2 from a distance pointed out one person as Anandrao Shankarrao Maratha (More) saying that his house is to be raided. Thereafter, all of them went to the house of that person and police cordoned the person sitting on the otta; that he was asked whether he wants his personal search to be conducted before the gazetted officer or magistrate, to which he declined. He was also told that his house is to be searched. Thereafter, the house was searched and during the search, from one cotton bag two plastic bags were found containing black substance. That substance was examined by the police persons and was found the same to be opium. Thereafter Dashrathsing went to call a person for weighing the substance found. He returned after one hour and thereafter, the substance found was weighed with scale. That dry opium weighed 953 grams, whereas green opium weighed 853 grams. That two samples weighing 24 grams each were taken from both and the sample as well as the remaining opium were packed and sealed in different packets with hot seal over it. That the slip containing signatures of the panch witnesses was put inside and out side both packings. It is also suggested that during the search charas was also found and the same weighed 404 grams. That the sample weighing

24 grams was taken therefrom; that the seized muddamal and the sample and the reserve sample were packed in different packing, putting the slips containing signatures of the witnesses inside and also on the outer side of the packings. The witness has identified his signature in all the slips as Exh.11 to Exh.19 found from muddamal packings further suggesting that during the search cash of Rs.10,000/- and Rs.35,736/- was found in the denomination of the currency notes of Rs.500/-, Rs.100/- and Rs.50/- from the house of the accused. The witness has further deposed that detailed panchnama of the search and seizure of the contraband opium and charas and taking of the samples and the recovery of cash amount of Rs.10,000/- and Rs.35,736/- was made in the house of the accused in presence of the accused and the witnesses. The panchnama drawn in presence of the witnesses and the accused in the house of the accused is proved at Exh.22.

11. It is submitted by Mr.Panchal that PW-5 Choksi Surajmal Nainmal, Exh.37, cannot be relied upon as he has been called from a distance of 12 kms. from the place of incident; that there will be number of shops of the goldsmith in the nearby area and there would be no need to travel a distance of 12 kms. and that PW-5 cannot be regarded as an independent witness.

It is suggested from the evidence of PW-4 that on 7.4.1997, he, as a member of the raiding party, had gone to the house of Anandrao Shankarrao Maratha (More) in Ghodasar area near Verai Maata temple. That PW-3 in presence of panchas asked the name of a person, who was cordoned by the police persons and he gave his name as Anandrao Shankarrao Maratha (More). Thereafter, PW-3 told Anandrao Shankarrao Maratha (More) that information is received to the effect that he has been keeping the stock of opium and charas and selling the same, and that his house is to be searched. Whether he wants the search to be taken in presence of gazetted officer then arrangement could be made for the same, to which Anandrao Shankarrao Maratha (More) declined. That Anandrao Shankarrao Maratha (More) was also told whether he wants to take search of the panchas and police staff, to which also Anandrao Shankarrao Maratha (More) said no. That thereafter, the house was searched in presence of Anandrao Shankarrao Maraha (More) and panch witness and from the house of Anandrao, substance was found which on examination was found to be opium. That Anandrao was asked whether he has any licence or authorization for keeping the same to which he replied in the negative. That thereafter, PW-3 asked the witness to call a person to weigh the seized contraband, whereupon the witness

went to call a person to weigh the contraband. That he returned with Surajmal Nainmal for weighing the recovered muddamal. That Surajmal had come with his weight and measures. That the seized opium weighed 953 grams and 870 grams respectively from which samples were taken. That sample of 24 grams from the seized contraband was taken. That seized charas weighed 404 grams from which also the samples weighing 24 grams was also taken. That Surajmal had weighed the muddamal opium and charas recovered during the search in the house of accused no.1. That one sample of 24 grams from each was kept for Forensic Science Laboratory and sample of 24 grams as reserve sample was also taken.

12. It is suggested from the evidence of PW-5 Surajmal Nenmal, Exh.37, that he is having his shop for the business of gold and silver in Jahangirpura area; that on 7.4.1997 at about 3.00 O'clock in the noon Dashrathsinh came to his shop and told him that contraband articles are seized, whereupon he accompanied Dashrathsing with scale, weights, measures and estimate book and was taken to a place which was a shade in Ghatlodia area where 7 to 8 police persons and 2 to 3 other persons were there and was asked to weigh two different materials; that the materials were kept in different plastic bags; that the first material weighed 953 grams whereas the weight of the other plastic bag containing the material was 870 grams; that while he was weighing the material the search was on in this place; that from each packet two samples of 24 grams each were taken and after deducting the weight of the sample material, one packet weighed 905 grams, whereas other packet weighed 929 grams; that thereafter the material weighed by the witness was put in the plastic bags and sealed and thereafter wrapped in a brown paper the plastic bags were put and seals were applied. It is further suggested that witness has identified the muddamal and the samples marked as B/1 and B/2 and thereafter, other material was also seized which was in the shape of role; that the said material was Charas and the witness was asked to weigh that material also which weighed 404 grams from which two samples of 24 grams each were taken and the remaining material weighed 356 grams net and this material and the two samples were also packed and sealed as earlier material and sample; that the witness has also identified muddamal and the sample mark C/1 and C/2.

Thus, the evidence of PW-5 corroborates the prosecution version of PW-5 having gone to the place of incident and weighed the seized muddamal which weighed

950 grams and 870 grams and other muddamal article Charas weighed 404 grams. Nothing has been brought out from the cross-examination of PW-5 so as to discard his testimony as far as the weighing of the muddamal at the place of incident is concerned.

13. The evidence of PW-6 - Bhimabhai Nanjibhaji, Head Constable, Exh.39, suggests that on 7.4.1997 he was on duty as PSO between 20.00 to 00.00 hours; that the complaint / offence was registered at 20.30 hours and that the same was noted in the station diary vide Entry No.11 at Page-10 (Exh.40) in the hand writing of the witness. It is also suggested that the witness had received the muddamal in sealed condition in different packets vide muddamal receipt No.13/17 noted in the panchnama; that the witness has also received the cash amount; that the witness has identified the muddamal Mark weights A/1 and A/2, Mark B, B/1 and B/2 and Mark C, C/1 and C/2; that the scale and weights were also along with the muddamal in the police station; that he also identified muddamal articles nos.3 and 4 and the bags containing currency notes and also the muddamal articles 6 and 7 and that all the muddamal articles were received in sealed conditions.

14. The evidence of PW-7 - Gokalbhai Ramabhai, First Grade Police Constable suggests that on 7.4.1997, PSO (PW-6) at 23.00 hours had handed over the muddamal of Crime Register No.5011/97 with the receipt. The witness had taken all muddamal articles in his custody vide Entry No.13 at Pages 190-192 (Exh.42) of Prohibition Reserve Register in his own hand writing and that on 9.4.1997, muddamal Mark A/1, B/1 and C/1 was handed over to police constable Arvindsinh Bhavansinh (PW-8) for being taken to Forensic Science Laboratory.

15. The evidence of PW-8 Arvindsinh B. Waghela Exh.45 suggests that since 2 years he is working in D.C.B. Crime Branch as constable. that on 9.4.1997 PSI Gohil had handed over the muddamal to the witness for being taken to Forensic Science Laboratory along with the forwarding letter. The witness along with the forwarding letter and the muddamal had gone to Head Constable Govindbhai and forwarding letter and the muddamal A/1, B/1 and C/1. Packets muddamal mark A/1, B/1 and C/1 were taken to Forensic Science Laboratory and deposited the said muddamal in the Forensic Science Laboratory and handed over the receipt issued by the Forensic Science Laboratory on the same day to crime writer. The witness has also identified the muddamal A/1, B/1 and C/1 as

having carried the same to Forensic Science Laboratory. As seen above, PW-11 has stated that the forwarding letter contained the seal as above stated and all the muddamal packets were received with seals intact.

16. It is suggested from the evidence of PW-10 Ashish Satyapal Bhatiya, D.S.P., Bharuch, (Exh.54) that on 7.4.1997, P.I. N.K.Chudasma had given the report in his own hand writing under his signature along with seized muddamal to the witness; that the witness had appended his signature thereon (Exh.55) and thereafter, on 8.4.1997 in a sealed cover P.I. N.K.Chudasma gave report to the witness regarding seizure of the muddamal and the arrest of the accused (Exh.55). The original report is at Exh.56.

17. The evidence of PW-11 Maheshchandra Chhabildas Champaneria, EXh.61, suggests that he is working as a Scientific Officer in Forensic Science Laboratory. That on 29.4.1997, 3 packings with seals intact were received from C.I.D. Crime Branch in C.R.No.Prohibition 5011/97 in the Forensic Science Laboratory which parcels / packets were received by the witness on 29.4.1997 for analysis; that those packets were marked A/1, B/1 and C/1 with the seals of Inspector of Police, D.C.B. Ahmedabad City and same tallied with the samples seal in the forwarding letter; that below the seal in each packet there was paper slip containing signatures / names of the persons put in presence of P.I., Narcotic Cell, D.C.B., Ahmedabad city; material from Mark A/1 and B/1 with hot seal contained substance of brownish - black colour, whereas material Mark C/1 contained in plastic bag sealed with hot seal contained therein two cylinder shape brownish - blakc pieces; that in the laboratory all these articles were given mark C/1/1 and C/1/2; that sample mark A/1 and B/1 on analysis were found to be opium, whereas sample C/1/1 and C/1/2 both the pieces on analysis were found to be Charas; that report Exh.52 was prepared which was sent to the police department.

18. Exh.52, Page-623 is the forwarding letter dated 5.5.1997 containing the seal as deposed by PW-11. Page 633 to 635 of Forensic Science Laboratory Narcotic Division Ahmedabad suggests the description of the samples received and the analysis / examination of the samples, whereas page 626 to 631 suggests the analysis of the samples received by the Forensic Science Laboratory, and the Page 635 contains the result of the analysis, which reads parcels as A/1 and B/1; that the sample / parcel A/1 was found to be the pieces of opium, whereas sample / parcel C/1/1, parcel C/1 and C/2 were found to

be Charas.

19. One of the arguments advanced by Mr.Panchal is that the documents reports Exh.55 and Exh.56 are concocted. The evidence of PW-3 and the evidence of PW-10 clearly establish that the erasion or correction in the report pertaining to the telephone number in Exh.55. PW-10 in his evidence has stated that he has initialed the documents Exh.55 and Exh.56. The evidence of PW-10 supports the evidence of PW-3 that he had submitted the report. Mere erasion of the telephone number by some one through some inadvertence cannot render the report concocted or got up. The submission of Mr. Panchal on this core does not deserve any credence.

20. It is the say of the prosecution that during the personal search of the accused, currency notes of Rs.10,000/- were recovered in the denomination of Rs.500/-, Rs.100/- and Rs.50/-. It is also the say of the prosecution that during the search, a tin bag was found lying on a table and opening the same, one while cotton bag was found and from the said cotton bag, currency notes of Rs.35,736/- were recovered. This fact has been proved by the evidence of PW-1, PW-2, PW-3 and Panchnama Exh.22. The accused in his statement under Section 313 of the Code of Criminal Procedure has denied the find of Rs.10,000/- from the pocket of his trouser in his personal search and recovery of Rs.35,736/- from one white cotton bag which was in the tin bag.

The accused had led defence evidence and examined DW-2 Bhupendrabhai Naranbhai Thakore Exh.65. It is suggested from the evidence of DW-2 that he is the owner of plot of land admeasuring 200 yards known as "Narayan Estate" adjacent to Khodidas Chamber; that there on one house is constructed wherein accused - Anandrao Shankarrao Maratha (More) is residing as he served the father of the witness for 20 years; that no rent was charged from the accused for occupying this house; that as the witness was contemplating to construct a shopping centre in the open land, accused Shankarrao was called and told that another house would be constructed for him and he should vacate this house; that the accused had demanded Rs.50,000/- for the same; that this talk took place before 1 and 1/2 years; that the accused was called on the next day and was given Rs.50,000/- and the accused promised to hand over the possession within 2 to 3 weeks. But, he did not vacate the house and gave false assurances 8 to 10 times to vacate the house; that he had told Jitendrasinh (PW-2) that accused is not vacating the house even after taking Rs.50,000/-, whereupon PW-2 had

told the witness that if he assures to satisfy him, he will get the premises vacated to which the witness had agreed; that after 2 to 3 days PW-2 had met the witness and told that narcotic case has been filed against the accused and his house would be vacated, whereupon the witness told PW-2 that no case was to be filed as the witness has good relations over the years with accused, whereupon PW-2 had told the witness that Anandrao would be acquitted as witnesses are the persons of police. It is pertinent to note that even according to the witness no rent was charged from the accused for occupying the house which was constructed for the occupation by the accused as the accused served his father for over 20 years, and that the accused was paid Rs.50,000/- for vacating the house. Now, when the accused did not hand over the possession of the premises and was giving false promises even after taking Rs.50,000/-, the witness would at least call upon the accused to vacate the premises. There is absolutely nothing to suggest that the accused ever assured of vacating the premises. The witness would at least take a simple writing, leaving aside the payment of Rs.50,000/-, from the accused that he would hand over possession of the premises within 2 to 3 weeks or any reasonable time, if that was really the understanding / agreement as deposed by DW-1. When DW-1 deposes that he paid Rs.50,000/- to the accused then in that case, he should be able to show the source of payment to the accused or the availability of Rs.50,000/- on hand with him. It is pertinent to note that despite the receipt of Rs.50,000/- the accused did not vacate the premises yet the relations continued to be smooth and cordial between the DW-1 and the accused. DW-1, at the same time, does not take any legal action for the recovery of possession of the premises from the accused. The evidence of DW-1 also suggests that he told PW-2 that case was not to be filed against the accused for getting possession, whereupon PW-2 is stated to have assured DW-1 that accused would be got acquitted. This would suggest the desire on the part of DW-1 to get the accused acquitted from the narcotic case. In our opinion, the defence version is absolutely incredible and it is nothing but a concocted defence to explain the recovery of the cash amount of Rs.10,000/- and Rs.35,736/- during the raid as proved by PW-1, PW-2 and PW-3 and Exh.22. The recovery of such a big amount would establish that the same would be the sale proceeds of the contraband which the accused was consciously possessing and selling as per the prosecution case which fact is also proved from the recovery of the contraband opium and charas during the raid in such a big quantity.

21. The above discussion would reveal that the prosecution has established the recovery of contraband opium and charas recovered vide Pnachnama Exh.22 in presence of panch witness PW-1 and also through the evidence of PW-2 and PW-3 together with the recovery of cash amount of Rs.10,000/- and Rs.35,736/- during the personal search of the accused and also the find from the white cotton bag from the house of the accused respectively. The evidence of PW-8 suggests that the muddamal was delivered at Forensic Science Laboratory with seal intact. As seen above, PW-11 has stated that the forwarding letter contained the seal as above stated and all the muddamal packets were received with seals intact. The evidence of PW-11, Exh.61 and F.S.L. report Exh.52 suggest that the muddamal articles examined at the Forensic Science Laboratory were Charas and Opium as the evidence of PW-11, Exh.61, suggests the find of resin. As discussed above, it is also established that the muddamal articles recovered vide Panchnama Exh.22 remained in the same condition with seals intact till it reached the Forensic Science Laboratory. The prosecution has also established that the accused was in conscious and actual possession of Charas and Opium recovered from his house vide panchnama Exh.22. It is also established that the accused has been residing in this very premises wherefrom muddamal articles have been seized. Thus, the prosecution has established the guilt of the accused by reliable and cogent evidence beyond reasonable doubt. In our opinion, the conviction recorded by the trial Court is consistent with the evidence on record and absolutely justified, and the same does not call for any interference in this appeal and, therefore, conviction recorded and sentence imposed are confirmed. The appeal, being devoid of merits, deserves to be dismissed.

22. In the result, appeal fails and is dismissed.

(N.G.Nandi,J.)

(Ravi R. Tripathi,J.)

(vipul)